

Massachusetts Coastal Seafoods, Inc. and United Food & Commercial Workers Union, Local 15, AFL-CIO. Case 1-CA-23903

February 28, 1994

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND TRUESDALE

Upon a charge filed by the United Food & Commercial Workers Union, Local 15, AFL-CIO (the Union) on June 2, 1986, the General Counsel of the National Labor Relations Board issued a complaint against Massachusetts Coastal Seafoods, Inc. (the Respondent) alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act by unilaterally substituting a new health insurance plan for the employees. The Respondent filed an answer on August 4, 1986.

On July 21, 1993, the General Counsel filed a Motion to Strike Portions of the Respondent's Answer, and for Summary Judgment. On July 26, 1993, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.¹

Ruling on Motion for Summary Judgment

The General Counsel contends that the Respondent's denials to the allegations in paragraphs 6-10, 13, and 14 of the complaint, and its affirmative defenses should be stricken and that the matters alleged in paragraphs 6-10, 13, and 14 should be deemed admitted. The Respondent admitted all other complaint allegations.

Specifically, the Respondent's answer admits the allegations concerning the filing of the charge in the instant matter (par. 1), the business of the Respondent (par. 2), and the Respondent's involvement in interstate commerce and employer status (pars. 3, 4, and 5). The Respondent admits that Michael Kobialka, Robert Tomer, Duarte Medina, and Jose Tavares occupy the positions alleged in paragraph 6 of the complaint and

admits the supervisory and agency status of Kobialka and Tomer; however, it denies that Paul Harrington is plant manager and denies the supervisory and agency status of Harrington, Medina, and Tavares. Further, the Respondent denies that the unit alleged in paragraph 7 of the complaint is the appropriate unit, and that a majority of the employees in the unit designated the Union as their collective-bargaining representative on September 12 and 13, 1983, as alleged in paragraph 8. The Respondent admits that the Union requested recognition on September 13, 1983, but denies that the request encompassed the unit described in the complaint (par. 9) and that the Union is the exclusive representative of the employees for the purpose of collective bargaining (par. 10). The Respondent admits that it replaced the existing health insurance plan with a different plan (par. 11) and did so without giving the Union notice or an opportunity to bargain (par. 12), but denies that its conduct violates the Act or affects commerce (pars. 13 and 14). Additionally, the Respondent's answer states that it was and is free to make changes to its health insurance plan unilaterally because the Union was never certified as the exclusive bargaining representative of the employees in an appropriate unit and because the Board has never issued a remedial bargaining order directing the Respondent to deal with the Union as the exclusive bargaining representative of the employees in an appropriate unit. Finally, the Respondent answers that the changes made to the health insurance plan were necessary to maintain the Respondent's economic viability.

As noted above, the unfair labor practice charge in the instant matter was filed while Case 1-CA-21429 was pending before an administrative law judge. On March 30, 1989, the Board affirmed many of the judge's findings in that case, including the appropriate unit and the finding that the Union attained majority status in the unit on September 13, 1983, and was the exclusive bargaining representative of the employees from that date.² Further, because of the Respondent's "hallmark" unfair labor practices, the Board's decision included a *Gissel* (395 U.S. 595 (1969)) bargaining order directing that the Respondent "recognize, effective September 13, 1983, and on request, bargain with the Union as the exclusive collective-bargaining representative of all employees in the appropriate unit" (293 NLRB 496, 502). Thus, in the absence of a showing otherwise, the Respondent clearly was in 1986, and still is, obligated to recognize the Union and bargain with it in good faith on matters of wages,

¹ The record clearly indicates that the Respondent's answer, dated August 1, 1986, was received in the Regional Office on August 4, 1986, and not on August 4, 1991, as erroneously stated in General Counsel's motion. The error does not affect our consideration of the merits of the motion.

The record before us does not provide a full explanation for the 7-year delay between the Respondent's filing of the answer to the complaint and the General Counsel's filing of the Motion for Summary Judgment. We note, however, that Case 1-CA-21429, which involves the same parties and overlapping issues, was pending before Administrative Law Judge Richard A. Scully at the time the charge in this proceeding was filed. Case 1-CA-21429 was resolved by the Board on March 30, 1989. (See 293 NLRB 496.) Members Devaney and Truesdale did not participate in that proceeding.

² Implicit in the judge's findings was the finding that the Union's demand for recognition encompassed the unit found appropriate. Thus, the unit in which recognition was sought encompasses the same classifications as the unit described in par. 7 of the complaint in the instant case.

hours, and terms and conditions of employment.³ Hence, its answers to the contrary shall be stricken and these allegations shall be deemed to be admitted.

The Respondent's answer to the complaint admits that it did not notify the Union about changing the employees' health insurance plan, a mandatory subject of bargaining, and that it did not provide the Union with an opportunity to bargain about the change. *Valley Counseling Services*, 305 NLRB 959 (1991); *Pioneer Press*, 297 NLRB 972 (1990). The Respondent's defense that the change in plans was "necessary to maintain economic viability" is insufficient to justify a failure to bargain concerning a unilateral change. *Auburn Die Co.*, 282 NLRB 1044 (1987); *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063, 1064 (1973). Further, having admitted that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and having admitted the conduct that is the gravamen of the complaint, the Respondent's denials of the conclusional paragraphs that it violated Section 8(a)(5) and (1) and that its unfair labor practices affect commerce raise no issues warranting a hearing. Therefore, these denials shall be stricken and the allegations are deemed to be admitted.

Finally, with respect to the supervisory status of the individuals identified in paragraph 6, the Respondent admitted that at all material times Kobialka was its president and owner and that Tomer was its purchasing agent and that both persons were supervisors and agents within the meaning of the Act. The General Counsel points out that notwithstanding the Respondent's denials in connection with the other named individuals, in Case 1-CA-21429 Judge Scully expressly found that Working Foremen Tavares and Medina were supervisors and implicitly found that Plant Manager Harrington was a supervisor when the Respondent violated Section 8(a)(1) through conduct attributed to him. We note that Judge Scully based his findings about Harrington's conduct on evidence presented after 42 days of hearing that ended on February 27, 1985. Although the judge's decision issued December 31, 1986, it is entirely possible that Harrington was no longer plant manager on May 19, 1986, when the unilateral change in health insurance plans here occurred. Therefore, we decline to strike the Respondent's answer to paragraph 6 as to the allegations concerning Harrington. There is no such factual dispute regarding the supervisory status of Tavares and Medina, however. The Respondent's answer to the complaint admits that they are working foremen and denies only their

supervisory and agency status. Judge Scully specifically addressed the 2(11) status of the two working foremen and found that they were supervisors. Inasmuch as the answer to the instant complaint admits that these individuals occupy working foreman positions, we conclude that the answer is frivolous in its denial of their supervisory status, and we shall strike these answers and deem the allegations as to Tavares and Medina to be admitted.

In the absence of good cause being shown and on the basis of all of the foregoing, we find merit in the General Counsel's motion. Therefore, with the exception of Harrington's position and status, the Respondent's denials to the complaint and its affirmative defenses are stricken and deemed to be admitted. Further, inasmuch as the factual dispute concerning Harrington's position and status has no bearing on the Respondent's admitted unilateral substitution of the employees' health insurance plan, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business in Magnolia, Massachusetts, is engaged in the business of processing frozen fish. The Respondent, annually, in the course and conduct of its operations, purchases and receives goods, materials, and supplies valued in excess of \$50,000 directly from points outside the Commonwealth of Massachusetts. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all times material, the following named persons have occupied the positions set forth opposite their respective names, and are now, and have been at all times material herein, supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act.

Michael Kobialka	President/Owner
Robert Tomer	Purchasing Agent
Duarte Medina	Working Foreman
Jose Tavares	Working Foreman

The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time production and maintenance employees employed by the Re-

³ We are mindful that the Board declined to issue a certification of representative in that case because of objectionable conduct on each party's part, and that the *Gissel* bargaining order required that the Respondent bargain with the Union for a reasonable period of time. (293 NLRB at 500 fn. 11.) There has been no showing that Respondent's obligation to recognize the Union and bargain with it, has been extinguished since the issuance of that order.

spondent at its Magnolia, Massachusetts location, including cutters, packers, stackers, label table, cleanup, breeder and batter, warehouse, freezer, and quality control employees, and truck drivers, but excluding officer clerical employees, professional employees, salesmen, guards, and supervisors as defined in the Act.

On or about September 12 and 13, 1983, a majority of the employees in the unit designated and selected the Union as their representative for the purposes of collective bargaining. On September 13, 1986, the Union requested the Respondent to recognize it as the exclusive collective-bargaining representative of the employees in the unit and to bargain collectively with it as the exclusive collective-bargaining representative of the employees with respect to their rates of pay, wages, hours of employment, and other terms and conditions of employment. At all times since September 13, 1983, the Union by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the employees in the unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

On or about June 1, 1986, the Respondent replaced the unit employees' existing health insurance plan with a new, contributory health insurance plan. The Respondent replaced the unit employees' health insurance plan without prior notice to the Union and without having afforded the Union an opportunity to bargain about this change as the exclusive representative of the Respondent's employees. We find that this unilateral conduct constitutes a failure and refusal to bargain collectively with the Union as the representative of its unit employees, in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing to bargain with the Union by unilaterally replacing the employees' existing health insurance plan, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. We shall order, as the General Counsel requests, that the Respondent bargain with the Union, on request, over the health insurance plan provided pursuant to the Respondent's unlawful unilateral change in health plans,

to the extent it has not done so,⁴ and make its employees whole for all expenses incurred and benefits lost as a result of the Respondent's failure to give the Union notice of its intent to change the employees' health insurance plan and its failure to afford the Union an opportunity to bargain over a health insurance plan.

ORDER

The National Labor Relations Board orders that the Respondent, Massachusetts Coastal Seafoods, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with United Food & Commercial Workers Union, Local 15, AFL-CIO about its replacement of the health insurance plan with a new, contributory health insurance plan for employees in the following unit:

All full-time and regular part-time production and maintenance employees employed by the Respondent at its Magnolia, Massachusetts location, including cutters, packers, stackers, label table, cleanup, breeder and batter, warehouse, freezer, and quality control employees, and truck drivers, but excluding officer clerical employees, professional employees, salesmen, guards, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the above-described unit about the health insurance plan provided pursuant to unlawful unilateral change in health plans, to the extent it has not done so, and make its employees whole for all expenses incurred and benefits lost as a result of the Respondent's failure to give the Union notice of its intent to change the employees' health insurance plan and its failure to afford the Union an opportunity to bargain over the health insurance plan.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

⁴ We have been administratively advised that the Respondent has complied with the Board's Order in Case 1-CA-21429 (293 NLRB 496) and thus may already have bargained concerning a health insurance plan for the unit employees since its unlawful unilateral change in health plans. In the event it has so bargained, it shall not be required to do so again.

(c) Post at its facility in Magnolia, Massachusetts, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT fail or refuse to bargain with United Food & Commercial Workers Union, Local 15, AFL-CIO about our replacement of the health insurance plan with a new, contributory health insurance plan for employees in the following unit:

All full-time and regular part-time production and maintenance employees employed by us at our Magnolia, Massachusetts location, including cutters, packers, stackers, label table, cleanup, breadier and batter, warehouse, freezer, and quality control employees, and truck drivers, but excluding officer clerical employees, professional employees, salesmen, guards, and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive representative of the employees in the above-described unit about the health insurance plan provided pursuant to our unlawful unilateral change in health plans, to the extent we have not done so, and make the employees whole for all expenses incurred and benefits lost as a result of our failure to give the Union notice of our intent to change the employees' health insurance plan and to afford the Union an opportunity to bargain over the health insurance plan.

MASSACHUSETTS COASTAL SEAFOODS, INC.